IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ELECTION APPLICATION No. 1 of 2005
In
ELECTION PETITION No. 1 of 2004

For Approval and Signature:

THE HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DR. PRABHABEN KISHORSINH TAVIYAD - Petitioner(s)

Versus

SHRI KATARA BABUBHAI KHIMABHAI - Respondent(s)

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Appearance :

MR MK VAKHARIA for Petitioner No(s).: 1.

MR YF MEHTA for Mr. Vijay Patel for respondent

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CORAM :THE HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date : 22/06/2005

C.A. V. JUDGMENT

1.The petitioner of Election Petition No. 1 of 2004 has challenged the election of the Returned

Candidate, Mr. Katara Babubhai Khimabhai on the ground that there was corrupt practice adopted by the Returned Candidate during the election, by way of booth capturing and bogus voting. As per the averments made in the Election Petition, the margin of difference of votes between the Election Petitioner and the Returned Candidate is only 361 votes, and as per the averments in the Election Petition, there was a booth capturing and bogus voting at the instance of the Returned Candidate, and accordingly, the result of the election has been materially affected by corrupt practice.

2. The Returned Candidate was elected as a Member of Parliament in the election which took place in April 2004. The Election Petitioner was one of the candidates contesting election from 17-Dohad [ST] Parliamentary Consistency. The election was held on 20th April 2004. The Election Petitioner contested the election as a candidate sponsored by Indian National Congress while the returned candidate contested the election as a candidate sponsored by Bharatiya Janta Party [BJP]. The counting of the votes took place on 13th May 2004 wherein the returned candidate was declared elected, and according to the Election Petitioner she lost the election by a margin of only 361 votes. The

election of the returned candidate is challenged only on one ground, i.e. corrupt practice by way of booth capturing and bogus voting. The Election Petition is filed within the period of limitation.

3. In response to the notice issued by this Court in the Election Petition, the returned candidate, Mr. Katara Babubhai Khimabhai has filed his affidavit-in-reply to the Election Petition at exh. 14. By the said reply, the returned candidate has denied the allegations made in the Election Petition. It is denied by the returned candidate that the election agents of the returned candidate, namely: Bhavesh and Raman, along with other supporters have captured polling booths or that any bogus voting had taken place.\

4. This Court, thereafter, has framed the issues in the Election Petition on 27th January 2005. The issues were framed with the consent of the parties. The issues framed by this Court are as under:

> "[1]. Whether the election-petitioner proves his case regarding corrupt practice committed by returning candidate or his Election Agent or any other person with

the consent of the returned candidate or his Election Agent in connection with the polling booths, and whether the applicant is able to prove that any bogus voting took place at the polling stations mentioned in paragraph 6.2 of the Election Petition, i.e. Polling Station No. 158, Chitrodiya-1, Polling Station No. 159, Chitrodiya-2, Polling Station No. 150, Fulpura-1, Polling Station No. 151 Fulpura-2, Polling Station No. 160 Therka-1, Polling Station No. 161 Therka-2, Polling Station No. 162 Therka-3, Polling Station No. 117 Gheswa?

(2). Whether the election-petitioner proves that the respondent or his Election Agent or any other person with the consent of the returned candidate has committed corrupt practice as contemplated under section 123 (8) read with sec. 135-A of the Representation of Peoples Act, 1951 as per the averments in paragraphs 6 and 7 of the Election Petition in connection with the aforesaid polling booths?

(3). If yes, whether the election of the returned candidate is void?

(4). What relief can be granted to the

petitioner.”

5. The matter was thereafter adjourned for recording evidence.

6. Thereafter on behalf of the returned candidate an application being Election Application No. 1 of 2005 is preferred. By filing the said application, the returned candidate has prayed that the Election Petition is required to be dismissed on preliminary grounds. As per the averments in the said application, the Election Petitioner has produced certain documents on 4th November 2004 [at the stage of production of documents]. As per the averments in the application, the said documents were not produced along with the Election Petition, and, therefore, the Election Petition is defective in nature, and therefore, the same is required to be rejected at the threshold. It is also further alleged in the application that the documents which are produced on record are produced without any foundation. It is also further stated in the application that the Election Petitioner has not given any explanation as to why the documents at Sl. No. 1, 2, 3, 4 and 5 are produced at a late stage. It is also alleged in the application that the item at Sl. No. 6, which is in connection with

the outgoing calls from the mobile number 9426004702 could not have been produced without appropriate authentication, and, therefore, the same is not admissible in evidence. It is also the say of the applicant of Election Application No. 1 of 2005 that the documents produced by the Election Petitioner are the integral part of the Election Petition, and since they become part and parcel of the Election Petition, if such documents are taken on record, then the same are submitted after the period of limitation, and therefore, the Election Petition is required to be dismissed as time barred. It is also averred in the application that if the documents are taken out from the record, the petition becomes defective, as there is no other material or allegation. It is also averred in the application that when all these documents were in existence at the time when the Election Petition was filed, yet they were not annexed to the Election Petition. Therefore, the Election Petition is defective, and on that ground, the same is required to be rejected. It is also the say of the applicant that the documents referred to and produced at sl. no. 9 – affidavit of six persons, were not supplied to the respondent along with the Election Petition and, therefore, the Election Petition is defective, as non-supply of the said

affidavit along with the Election Petition has made the Election Petition defective, and, therefore, the same is required to be rejected. It is the further say of the applicant that some of the documents were already in existence at the time when the Election Petition was filed and yet such documents were not filed along with the petition – such as affidavit of six persons referred to above. The returned candidate, therefore, by preferring the aforesaid application, has prayed that this Court may frame the following issues, as issues No. 1 (A to 1 (C).

> "1(A). Whether the Election Petition filed by the petitioner is found to be materially defective as the copy of the petition supplied to the returned candidate / respondent do not contain the documents referred in the Election Petition alleging malpractice in the election, and now produced along with the list on 03/11/2004?
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> 1(B). Whether respondent is entitled to ask for dismissal of the Election Petition at this stage on this preliminary ground? Holding that there is non-supply of the copy of the Election Petition to the respondent as required under law.

1(C). Whether on any of the contentions raised in the application this Election Petition is defective in material particulars, and is required to be dismissed at this stage.

7. The applicant therefore prayed that the aforesaid issues may be framed as preliminary issues, and the Election Petition may be dismissed accordingly.

8. The Election Petitioner resisted the said application by filing a reply. In the said reply, it is stated that the application is filed with malafide intention to delay the hearing of the Election Petition, especially when the petition was fixed for recording of evidence. It is averred in the reply that none of the documents produced by the petitioner along with the list of documents is part and parcel of the petition. On this and such other grounds, the aforesaid election application is resisted on behalf of the Election Petitioner.

9. Both the learned advocates have argued the matter at great length so far as the aforesaid election application is concerned.

10. Mr. Mehta for Mr. Patel for the applicant submitted that as per the averments made in

paragraph 6.1 of the petition, the Election Petitioner received the information from Congress workers or agents, but no particulars are given about the same, and no names of any Congress worker or any agent is disclosed. Mr. Mehta further submitted that the source of information is not disclosed in the Election Petition as to from which source the petitioner has gathered the information and on that ground the petition is required to be dismissed in limine.

11. It is submitted by Mr. Mehta that the affidavit at pages 209-212 are not annexed with the petition, and, therefore, the Election Petition is required to be dismissed as it is a fatal mistake. It is also argued by Mr. Mehta that along with the list of documents FIR is produced in connection with the activities of some headstrong persons but the same is not annexed with the Election Petition. It is submitted by Mr. Mehta that there is a breach of section 83 of the Act, as affidavit, which is an integral part of the petition, is not attached along with the petition. It is also argued by Mr. Mehta that the affidavit at pages 21 to 23 is not in conformity with Form 25 read with Rule 94.A of the Rules. It is submitted that as appropriate particulars are not given, there is breach of section 83 of the Act, which

is mandatory. It is submitted by Mr. Mehta that in the affidavit the Election Petitioner has merely stated that the fact is based on information, and not on personal knowledge. It is submitted that such information is not disclosed by giving appropriate particulars, and, therefore, such affidavit cannot be said to be a proper affidavit as per Form 25, and the said mistake is not curable. It is submitted by Mr. Mehta that in view of proviso to sec. 83, the petition is required to be rejected at the threshold.

12. It is further submitted by Mr. Mehta that material facts are not disclosed about the alleged corrupt practice, and it is submitted that the affidavit of two persons, which is produced along with the list of documents should have been mentioned in the Election Petition itself, and such affidavit should have been annexed along with the Election Petition, as the same is an integral part of the petition, and in view of the fact that the same is not annexed along with the Election Petition, the petition is required to be dismissed.

13. In order to substantiate his say on the aforesaid points, Mr. Mehta has relied upon the following judgments:

(1). 2000 (8) SCC 191
(2). AIR 2000 SC 388
(3). 2000 (1) SCC 398
(4). AIR 2000 SC 694

14.Mr. Mehta submitted that the Election Petition is required to be dismissed in limine on the grounds that the affidavit filed by the petitioner at pages 21-23 is not in consonance with Form 25 of the Rules read with rule 94.A of the Rules; that proper particulars regarding the alleged corrupt practice are not disclosed in the Election Petition; and that the affidavit which is produced along with the list of documents is not produced along with the Election Petition eventhough it is an integral part of the Election Petition.

15.On the other hand, on behalf of the petitioner, it is pointed out by learned advocate Mr. Vakharia that the documents produced on record cannot be said to be an integral part of the Election Petition. It is submitted that all the particulars regarding alleged mal-practice adopted by the returned candidate at the time of election is stated in the Election Petition. It is submitted that proper particulars are already given in connection with the said allegation and it cannot be said that the Election Petition is

filed on vague allegations. It is submitted by him that the returned candidate has already filed a detailed reply resisting the petition on merits, and even in the reply no such ground is taken, and after issues were framed, and the matter was adjourned for recording of evidence, this application is filed. According to Mr. Vakharia, therefore, the application is required to be rejected and the Election Petition is required to be proceeded on merits.

16. It is further submitted that by Mr. Vakharia that it cannot be said that the petition filed by the Election Petitioner is defective in any manner, and it cannot be dismissed on the so called preliminary grounds. Mr. Vakharia, further submitted that the application is given with ulterior motive to delay the proceedings. It is submitted by Mr. Vakharia that the Election Petition was filed in June 2005 and the respondent, the returned candidate, filed affidavit-in-reply after 3 months. He further submitted that with the consent of the parties, the issues were framed by this Court on 27th January 2005. Mr. Vakharia submitted that even the other side also gave suggested issues. He further submitted that the present application is filed in March 2005, when the matter was posted for recording of evidence. Mr. Vakharia,

therefore, vehemently submitted that this application at a belated stage cannot be entertained, and requires to be rejected, and the Election Petition is required to be proceeded with.

17.Mr. Vakharia further submitted that in the Election Petition, all particulars about the alleged corrupt practices are already mentioned, and all the material particulars are already stated in the Election Petition. It is submitted by Mr. Vakharia that certain affidavits were received by the petitioner at a later point of time and since the said affidavits were not available when the petition was filed, naturally such affidavits were filed along with a separate list of documents. He further submitted that the petitioner got possession of affidavits of certain persons at a later point of time, and simply because such affidavits are ante-dated, i.e. prior to the date of filing Election Petition, would not mean that the petitioner was in possession of the documents at the time of filing the petition as such affidavit cannot be said to be a public document. It is submitted by Mr. Vakharia that in reply to the Election Application, the Election Petitioner has clearly stated that the said affidavits were not in possession of the Election Petitioner at

the time of filing the Election Petition. Mr. Vakharia submitted that the application is devoid of any merits, and is required to be rejected, and the Election Petition is required to be decided on merits. Mr. Vakharia submitted that so far as the affidavits in question are concerned, the same are filed only by way of documentary evidence, and the same are not filed in support of the original petition.

18.Mr. Vakharia has relied upon the following judgments in support of his contentions:
(1). AIR 1990 SC 924
(2). [2005] 2 SCC 188
(3). AIR 1975 SC 290
(4). AIR 2000 SC 388,

19.It is argued by Mr. Vakharia that the Election Petitioner has already given proper particulars in paragraphs 5 and 6 of the Election Petition, and as per pages 21 to 23 of the Election Petition, there is a proper affidavit. Mr. Vakharia submitted that without prejudice to his rights and contentions he is tendering a further affidavit by giving additional particulars, if at all it is found that the earlier affidavit is not in order.

20.Mr. Mehta, on the other hand submitted that such particulars now cannot be given for curing

the defect. He submitted that if the verification is not as per Form 25, the same is a fatal mistake, and in view of the judgment reported in 2005 [2] SC 188, further affidavit cannot be permitted to be filed.

21. I have heard the learned counsel in detail. It is required to be noted that in the Election Petition, in paragraphs 6.3.2, 6.4 and 6.4.1, the petitioner has made the following averments:

> "6.3.2 During the Lok Sabha election, in daily Sandesh – Panchmahals-Dohad edition dated 10th April 2004, there was a press report reporting a firing by Shri Bhaveskumar, son of Babubhai Katara. As per the aforesaid press report, Bhavesh, son of BJP candidate Babubhai Katara fired upon one Parsingbhai Taviyad, who is President of BJP-Fatepur Taluka.
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> 6.4 Shri Bhaveshkumar Babubhai Katara and Shri Raman Ranji Damor, along with their 25-30 supporters armed with weapons like gun, dharia, swords, sticks and such other weapons, seized the aforesaid polling stations and forcibly captured voting machines and cast bogus votes in favour of

the respondent and affected the orderly conduct of election. By their aforesaid acts and conduct, they have prevented registered voters from free exercise of their right to vote and also coerced and/or forced and/or intimidated and threatened directly or indirectly the electors and prevented them from going to the polling station to cast their votes. Both the aforesaid persons were working for the election of the respondent and they had committed corrupt practice of booth capturing with the consent of the respondent. The particulars of the aforesaid corrupt practice are as under:

6.4.1. In village Chitrodiya of Jhalod Assembly Constituency, there are two polling stations, viz. Polling Station No. 158, Chitrodiya-1 and Polling Station No. 159, Chitrodiya-2. Both the polling stations are located in village primary school and they are adjoining to each other. Shri Bhaveshkumar Babubhai Katara and Shri Raman Ranji Damor along with their 25-30 supporters armed with weapons like gun, dharia, swords, sticks and other weapons had arrived at the aforesaid primary school at about 7 am and seized both the polling stations. The petitioner had appointed one Shri Parsingbhai

Rangabhai Katara of village Chitrodiya as her polling agent for poling booth no. 158 and one Shri Dalabhai Rangabhai Katara of village Chitrodiya for polling station No. 159. Both of them were threatened at the polling stations by Bhaveshkumar Babubhai Katara and his supporters and prevented them from producing their agent nomination forms before the appropriate authority. Both of them were asked to leave the polling station, or to face dire consequences. Under the said threat, both the poling agents of the petitioner had left without presenting their agent nomination forms and also without casting their votes. After seizing the aforesaid polling booths, they had forcibly taken over the voting machines and cast votes of registered voters of the aforesaid two polling stations in favour of the respondent. Bhaveshkumar Babubhai Katara had pointed his gun on the head of Shri Vasaiya Maheshkumar Motilal, Assistant Presiding Officer of Polling Booth No. 159 and as a result all persons at both the polling stations were frightened. Smt. Ramilaben Vichhiyabhai Vasaiya who is the Sarpanch of village Chitrodiya along with her husband Vichhiyabhai Vasaiya had visited the polling booth to cast their

votes between 7.30 am and 8 am. When she had seen Bhaveshkumar pointing his gun on the head of the Assistant Presiding Officer Shri Vasaiya Maheshkumar Motilal, Smt. Ramilaben mustered courage and requested Bhaveshkumar to remove the gun from the head of Assistant Presiding Officer since his purpose of booth capturing and bogus voting was already served. Bhaveshkumar threatened Ramilaben and her husband and asked them to leave polling booth immediately or to face dire consequences. Bhaveshkumar also informed Ramilaben and her husband to tell the village people not to visit polling booth since their votes are already cast. Both Ramilaben and her husband were prevented from exercising their electoral right and instead Bhaveshkumar and his supporters have cast their bogus votes. Bhavesh, Raman and their supporters had also warned Vashiya Maheshkumar, Ramilaben and her husband and others not to take any action or inform anyone regarding booth capturing and threatened them with serious consequences. All the votes recorded at the aforesaid polling stations are not the votes cast by genuine voters, but by Bhaveshkumar Babubhai Katara and his supporters. Both the polling booths were

captured from about 7 O' Clock to 11 am and all recorded votes were cast by Bhaveshkumar and his supporters during the aforesaid period at the aforesaid polling booths and genuine registered voters were prevented from exercising their votes. At polling booth no. 158 the total number of voters are 888, out of which 837 votes were recorded. Likewise at polling booth no. 159, the total number of votes are 898 out of which 845 votes were recorded. The percentage of voting at polling booth no.158 is 94.25% and at polling booth no. 159 is 95.15%. Out of 837 votes recorded at polling booth No. 158, the respondent had secured 837 votes while the other three contesting candidates had secured nil votes. Likewise, out of 845 votes recorded at polling booth no. 159, 844 votes are recorded in favour of the respondent and one vote is recorded in favour of Katara Sigjibhai and no votes are recorded in favour of the petitioner and other contesting candidate Somjibhai Damor. The percentage of voting at the aforesaid two polling booths and number of votes secured by the respondent are by themselves indicate booth capturing."

22.As stated earlier, the election is challenged

only on one ground, i.e. Booth Capturing and bogus voting at the instance of the Returned Candidate. In the Election Petition, the Election Petitioner has averred various factual aspects in connection with so called alleged booth Capturing or bogus voting. In paragraph 7 and 7.1 it is averred as under:-

> "7. The petitioner states that one Shri Madhubhai Manyabhai Damor, Sarpanch of village Sabli, who is a BJP worker and supporter of the respondent-returned candidate was working for the furtherance of the prospects of the election of the returned candidate, within the knowledge and with the consent of the respondent herein. The aforesaid Madhubhai Manyabhai Damor along with his 50-60 supporters had captured polling station no. 190, village Sabli of Jhalod Assembly Constituency and captured voting machine and cast bogus votes as if genuine voters have voted. Shri Madhubhai Damor had seized polling station No. 190-Sabli and committed corrupt practice as contemplated under section 123 (8) read with section 135.A of the Act with the consent of the respondent. The particulars regarding the said incident are as under:
>
> 7.1 Polling booth no. 190, Sabli in Jhalod

Assembly Constituency was captured at about 10 a.m. By Shri Madhubhai Manyabhai Damor, Sarpanch of village Sabli, who is a BJP worker along with his supporters. Sarpanch Madhubhai Manyabhai Damor was working for the election of respondent Babubhai Katara within his knowledge and with his consent. He along with his 50-60 supporters threatened Shri Abhesing Tarar who was polling officer at the aforesaid polling station 190, Sabli and other officers on duty. Abhesing Tarar is the Headmaster of Shangal Prathmik School, Meghraj Taluka,Sabarkantha District and he was posted as polling officer at the aforesaid polling station. Sarpanch Madhubhai Manyabhai Damor and his supporters forcibly snatched the voting machine and gave threat of dire consequences to Abhesing Tarar and other officers on duty and cast bogus votes as if genuine voters have voted. In the said polling station the total number of voters are 1217, out of which 971 votes are recorded. Out of 971 votes, 962 votes are recorded in favour of the respondent and only 9 notes are recorded in favour of other three contesting candidates. The percentage of voting and number of votes cast in favour of the respondent by itself

sufficiently indicate bogus voting and booth capturing."

23. There is a verification below the Election Petition since the Election is challenged on the ground of alleged corrupt practices, a separate affidavit is also filed, as required by law [proviso (1) to sec. 83 of the Act]. The Election Petitioner has given particulars as to on what basis the petitioner has got information about the aforesaid allegation of booth capturing.

24. At this stage, this Court is not required to consider whether the averments or allegations in the Election Petition is sufficient for coming to the conclusion that elected candidate adopted mal practice or adopted device of booth capturing, as ultimately, the said question is required to be decided at the time of deciding the main petition. At this stage, the point which is required to be considered is whether the Election Petition filed by the petitioner is defective for want of appropriate particulars about the alleged corrupt practice or whether there is any violation of any mandatory provisions of the Act or Rules, which requires the petition to be dismissed at the threshold. The averments made in the Election Petition is already incorporated in the earlier

part of this order, and as pointed out earlier, this petition is filed solely on the ground of booth capturing and there is no allegation of any other corrupt practice, which is alleged in the Election Petition.

25.So far as the particulars about the alleged act of so called booth capturing is concerned, in my view, it cannot be said that the petitioner is vague or that no particulars are given in this connection. Reading the Election Petition as a whole, there are detailed averments in this behalf. Whether the allegations and averments are correct or not, is altogether a different matter, as ultimately the petitioner is required to prove her case at the time of trial of the Election Petition. However, in my view, it cannot be said that the averments or allegations made in the petition are vague or that it does not disclose any cause of action at all, by which the petition is required to be dismissed in limine as per the analogy of Rule 7 Order 11 of the Civil Procedure Code.

26.I am not in a position to agree with the submission of Mr. Mehta that the affidavits of Dilip Suvera as well as of Abhaysingh, who were assigned duty as polling officers at the relevant day, is an integral part of the

petition and since such affidavits are produced with the list of documents, and not annexed with the Election Petition, the petition is required to be thrown out. Apart from that, it is argued by Mr. Vakharia that the said affidavits have been filed by way of evidence and such affidavit was not available at the time when the Election Petition was drafted. Evidentiary value of such affidavits is required to be examined at the trial of the Election Petition. Any document to which a reference is made in the Election Petition is naturally to be annexed with the petition and a copy thereof is required to be given to the other side. As stated earlier, these affidavits are tendered along with the list of documents by way of documentary evidence, and there is no reference to the affidavits in the original Election Petition. Under the circumstances, non-supply of copy of these affidavits along with copy of the Election Petition cannot be said to be fatal to the Election Petition, as there is no reference to such affidavits in the Election Petition. Whether any importance can be given to such affidavits or the evidentiary value of such affidavits can be examined only at the time of trial, but it cannot be said that the affidavits, to which there is no no reference in the petition, are integral part of the petition, and since it is not given to the

respondent at the time of filing the Election Petition, the Election Petition is required to be dismissed. It is not the case wherein affidavits have been referred to in the Election Petition and the same have not been made available along with the Election Petition. Still however, this Court can examine whether such affidavits were in the possession of the Election Petitioner at the time of deciding the Election Petition.

27. At this stage, reference is required to be made to the judgments cited by both the sides.

28. Mr. Mehta relied on the judgment in the case of RAVINDER SINGH vs. JANMEJA SINGH reported in (2000) 8 SCC 191. In the said judgment, the Apex Court held that Election Petitions containing allegations of corrupt practice must be accompanied by an affidavit in support of the allegations and defect thereof will be fatal to the Election Petition. In the facts of the case, the Apex Court held as under in paragraph 7 of the judgment:

> "7. The Election Petition is singularly silent about any such averment that the returned candidate, even if, it be assumed for the sake of arguments, had published and

distributed certain documents (Annexures A-1 to A-7), as alleged in the Election Petition either himself or through any other persons with his consent, that those statements were false and that the returned candidate either believed them to be false or did not believe them to be true, though in para 9 of the Election Petition, which has been verified as correct on the basis of legal advice, this requirement emanating from Section 123 (4) has been mentioned but without any assertion that the returned candidate in this case published the false statements knowing them to be false and or not believing them to be true. The submission of Mr. Talwar that at the trial the petitioner could have said so in his evidence, is futile. It is an established proposition that no evidence can be led on a plea not raised in the pleadings and that no amount of evidence can cure defect in the pleadings."

29. It is also observed by the Honourable Court in paragraph 11 of the judgment that sec. 83 of the Act is mandatory in character and requires

not only a concise statement of material facts and full particulars of the alleged corrupt practice, so as to present a full and complete picture of the action to be detailed in the Election Petition levelling a charge of corrupt practice is required, by law, to be supported by an affidavit in which the Election Petitioner is obliged to disclose his source of information in respect of commission of that corrupt practice. The court further held that the reason for such insistence is to prevent any fishing and roving inquiry and save the returned candidate from being taken by surprise. In the absence of proper affidavit, the order of dismissal of the Election Petition without putting it to trial cannot be faulted with.

30.Mr. Mehta also relied on the judgment of the Apex Court in the case of R.P. MOIDUTTY vs. P.T. KUNJU MOHAMMED reported in AIR 2000 SC 388. In the said judgment, the Apex Court held that pleadings and averments relating to corrupt practice in the Election Petition have to be verified in compliance with mandatory requirement of O.6 Rule 15 of the CPC and for lack of particulars and want of affidavit in required forum, the petition is liable to be rejected at the threshold. The Apex Court observed in paragraph 14 of the said judgment,

the relevant portion of which, is as under:

> "14. xx xx xx xx Under section 83 of the Act ordinarily it would suffice if the Election Petition contains a concise statement of material facts relied on by the petitioner, but in the case of corrupt practice the Election Petition must set forth full particulars thereof including as full a statement as possible of (i). the names of the parties alleged to have committed such corrupt practice, (ii). the date, and (iii). place of commission of each such practice. An Election Petition is required to be signed and verified in the same manner as is laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. However, if the petition alleges any corrupt practice then the petition has additionally to be accompanied by an affidavit in Form No. 25 prescribed by Rule 94A of the Conduct of Election Rules, 1961 in support of the allegations of such corrupt practice and the particulars thereof. Thus an Election Petition alleging commission of corrupt practice has to satisfy some additional requirements, mandatory in nature, in the matter of raising of the pleadings and verifying the averments at the stage of

filing of the election petition and then in the matter of discharge the onus of proof at the stage of trial."

31.In paragraph 35, the Apex Court observed as under:

"35. All the averments made in paras 1 to 17 of the petition have been stated to be true to the personal knowledge of the petitioner and in the next breath the very same averments have been stated to be based on the information of the petitioner and believed by him to be true. The source of information is not disclosed. As observed by the Supreme Court in F.A. Sapa v. Singora, AIR 1991 SC 1557 : (1991 AIR SCW 1492) the object of requiring verification of an Election Petition is to clearly fix the responsibility for the averments and allegations in the petition on the person signing the verification, and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. However, the defect of verification is not fatal to the petition; it can be cured. [See Murarka Radhey Sham Ram Kumar v. Roop Singh Rathore, AIR 1964 SC 1545 : A.S. Subbaraj v. M. Muthiah (1953) 5 ELR 21]. In the present case the defect in verification was

pointed out by raising a plea in that regard in the written statement. The objection was pressed and pursued by arguing the same before the Court. However, the petitioner persisted in pursuing the petition without proper verification which the petitioner should not have been permitted to do. In our opinion, unless the defect in verification was rectified, the petition could not have been tried. For want of affidavit in required form and also for lack of particulars, the allegations of corrupt practice could not have been inquired into and tried at all. In fact, the present one is a fit case where the petition should have been rejected at the threshold for non-compliance with the mandatory provisions of law as to pleadings."

32. Mr. Mehta also relied upon the judgment in the case of SHIVAJIRAO B. PATIL KAWEKAR vs. VILASRAO D. DESHMUKH reported in (2000) 1 SCC 398. In the said judgment, in paragraph 17, the Apex Court reiterated the principles laid down in the case of Jeet Mohinder Sigh vs. Harminder Sigh Jassi reported in (1999) 9 SCC 386 wherein it was held that the success of a candidate who has won at an election should not be lightly interfered with. Though the purity of the

election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch re-election involves enormous load on the public funds and administration. In the said judgment, the Apex Court also quoted paragraph 41 of the judgment in the case of Jeet Mohinder Sigh [supra] which reads as under:

> "41. Section 83 of the RPA required every Election Petition to contain a concise statement of the material facts on which the petitioner relies. If the Election Petition alleges commission of corrupt practice at the election, the Election Petition shall set forth full particulars of any corrupt practice including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. Every Election Petition must be signed and verified by the petitioner in the manner laid down for the verification of pleadings in CPC. An Election Petition alleging

corrupt practice is required to be accompanied by an affidavit in Form 25 read with Rule 94-A of the Conduct of Election Rules, 1961. Form 25 contemplates the various particulars as to the corrupt practices mentioned in the Election Petition being verified by the petitioner separately under two headings: (i). which of such statements including particulars are true to the petitioner's own knowledge, and (ii). Which of the statements including the particulars are true to information of the appellant. It has been held in Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe that the Election Petitioner is also obliged to disclose his source of information in respect of the commission of the corrupt practice so as to bind him to the charge levelled by him and to prevent any fishing or roving inquiry, also to prevent the returned candidate from being taken by surprise."

33. Mr. Mehta also relied on the judgment in the case of V. NARAYANASWAMY vs. C.P. THIRUNAVUKKARASU reported in AIR 2000 SC 694 and submitted that as the affidavit filed in the instant case is not in conformity with form 25, the petition is required to rejected at the threshold for non-compliance with the mandatory

provisions of law. The Apex Court in the said judgment held in paragraph 31 that the Election Petition not only lacked the material facts, it lacked material particulars, defective verification and the affidavit filed was not in the form prescribed. It also held that the ingredients of corrupt practices are also lacking, and, therefore, upheld that order passed by the High Court dismissing the Election Petition on these grounds.

34. In the said judgment [V. Narayanaswamy, supra], in paragraph 22, the Court also considered the difference between "material facts" and "material particulars" and held that "while the failure to plead material facts is fatal to the Election Petition and no amendment of the pleading could be allowed to introduce such material facts after the time limit prescribed for filing the Election Petition, the absence of material particulars can be cured at a later stage by an appropriate amendment. In the same paragraph, in the relevant portion quoted below, the court further held that :-

> " ..... holding that if petition suffers from lack of material facts, it is liable to be summarily rejected for want of cause of action, and if the deficiency is only

of material particular, the Court has a discretion to allow the petitioner to supply the required particulars even after the expiry of limitation. With regard to the affidavit to be filed along with the Election Petition in the prescribed From No. 25, the Court observed that the defect in such affidavit could be cured unless it formed the integral part of the petition in which case, the defect concerning material facts will have to be dealt with subject to limitation under Section 81 of the Act. “

35. On the other hand, Mr. Vakharia relied upon the judgment in the case of RAHIM KHAN VS. KHURSHID AHMED reported in AIR 1975 SC 290. Mr. Vakharia drew my attention to paragraph 32, in which the Apex Court held as under:

> 32 . xxxx xxx xxx “No corrupt practice can be established if processal impediments are heaped up against the credibility of witnesses. Nor can any petitioner go into such minutes as the names of all witnesses, even at the time the Election Petition is prepared. Neither section 84 nor section 83 nor even Rule 94.A and form 25 require this drastic attitude. .... But every witness

need not be mentioned as a source and every source informant need not be examined necessarily. Whether the omission to do so in a given case reflects on the credibility of the evidence depends upon the facts and circumstances of the case. It depends on the overall circumstances and the fairness of the trial."

36. Mr. Vakharia also relied on the judgment in the case of U.S. SASIDHARAN vs. K. KARUNAKARAN reported in AIR 1990 SC 924. In paragraph 14 to 17, the Apex Court held as under:

"14. It has been already noticed that the high court dismissed the Election Petition as the appellant has not furnished to the first respondent copies of the notice, photograph and the video cassette referred to above along with a copy of the Election Petition. So far as the copies of the notice and the photograph are concerned, we do not think that the High Court was justified in holding that these should have also been furnished to the first respondent along with the copy of the Election Petition. Dr. Chitale, learned counsel appearing on behalf of the first respondent, also has not urged that the copies of these two documents should have

been served upon the first respondent. What has, however, been vehemently urged on behalf of the first respondent is that he would have been served along with the Election Petition a copy of the video cassette. This contention will be considered presently.

15. We have already referred to section 83 relating to the contents of an Election Petition. The Election Petition shall contain a concise statement of material facts and also set forth full particulars of any corrupt practice. The material facts or particulars relating to any corrupt practice may be contained in a document and the Election Petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election, the document become incorporated in the Election Petition by reference. In other words, it forms an integral part of the Election Petition. Section 81 (3) provides for giving a true copy of the Election Petition. When a document forms an integral part of the Election Petition and

a copy of such document is not furnished to the respondent along with a copy of the Election Petition, the copy of the Election Petition will not be a true copy within the meaning of section 81 (3) and, as such, the court has to dismiss the Election Petition under S. 86 (1) for non-compliance with section 81 (3).

16. On the other hand, if the contents of the document in question are pleaded in the Election Petition, the document does not form an in integral part of the Election Petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of S. 81 (3). The document may be relied upon as an evidence in the proceedings. In other words, when the document does not form an integral part of the election, but has been either referred to in the petition or filed in the proceedings as evidence of any fact, a copy of such a document need not be served on the respondent along with a copy of the Election Petition.

17. There may be another situation when a copy of the document need not be served on the respondent along with the Election Petition. When a document has been filed in

the proceedings, but is not referred to in the petition either directly or indirectly, a copy of such document need not be served on the respondent. What S. 81 (3) enjoins is that a true copy of the Election Petition has to be served on the respondents including the elected candidate. When a document forms an integral part of an Election Petition containing material facts or particulars of corrupt practice, then a copy of the Election Petition, without such a documents not complete and cannot be said to be a true copy of the Election Petition. Copy of such document must be served on the respondents".

37.Mr. Vakharia also relied on the judgment in the case of R.P. MOIDUTTY VS. P.T. KUNJU MOHAMMED reported in AIR 2000 SC 388. In paragraphs 15 to 17, the Apex Court held as under:

15. In F.A. Sapa vs. Singora AIR 1991 SC 1557 : (1991 AIR SCW 1492), this Court has held (para 28):

"A charge of corrupt practice has a two dimensional effect : its impact on the returned candidate has to be viewed from the point of view of the

candidate's future political and public life and from the point of view of the electorate to ensure the purity of the election process. There can, therefore, be no doubt that such an allegation involving corrupt practice must be viewed very seriously and the High Court should ensure compliance with the requirements of Section 83 before the parties go to trial. While defective verification of a defective affidavit may not be fatal, the High Court should ensure its compliance before the parties to go trial so that the party required to meet the charge is not taken by surprise at the actual trial. It must also be realised that delay in complying with the requirements of section 83 read with the provisions of the C.P.C. or the omission to disclose the grounds or sources of information, though not fatal would weaken the probative value of the evidence ultimately lead at the actual trial. Therefore, an Election Petitioner can afford to overlook the requirements of Section 83 on pain on weakening the evidence that he may ultimately tender at the actual trial of the Election Petition. The charge

of corrupt practice has to be proved beyond reasonable doubt and not merely by preponderance of probabilities. Allegation of corrupt practice being quasi-criminal in nature, the failure to supply full particulars at the earliest point of time and to disclose the source of information promptly may have an adverse bearing on the probative value to be attached to the evidence tendered in proof thereof at the trial. Therefore, even though ordinarily a defective verification can be cured and the failure to disclose the grounds or sources of information may not be fatal, failure to place them on record with promptitude may lead the Court in a given case to doubt the veracity of the evidence ultimately tendered.

16. Though the decided cases illustrative of the nature of particulars required to be pleaded in support of an averment of corrupt practice area available in plenty, it would suffice to refer to two only. In Rahim khan vs. Khurshid Ahmad, (1975) 1 SCR 643 : (AIR 1975 SC 290), it was held that it was not the requirement of Sections 83 and 87 of the Act or

Rule 94-A and Form No.25 thereof to mention the names of the witnesses as a source of information or as a part of the particulars. Every witness need not be mentioned as a source and every sources informant need not be examined necessarily. However, omission to do so in a given case may reflect on the credibility of the evidence depending on the facts and circumstances of an individual case. The court has to be careful to insist that the means of knowledge are mentioned right in the beginning to avoid convenient embellishment and irresponsible charges; though, good are reliable testimony should not be stifled nor proof or corrupt practices thwarted by technicalities of procedure.

17. In Azhar Hussain vs. Rajiv Gandhi (1986) 2 SCR 782 : (AIR 1986 SC 1253 : 1986 Cri. L.J 625), the corrupt practice alleged was referable to the returned candidate and as committed at the meetings organized during the election campaign. This Court held that dates and particulars of the meetings should be given so as to eliminate the possibility that witnesses could be procured later on for adducing evidence. In the contest of the charge of

corrupt practices referable to distribution of certain pamphlets, this Court held that the pleadings should have stated who had distributed the pamphlets when, where and to whom they were distributed and in whose presence. This Court further observed that no amount of evidence could cure the basic defect in the pleadings.

38.Mr. Vakharia also cited before me the judgment in the case of CHANDRAKANT UTTAM CHODANKAR vs. DAYANAND RAYU MANDRAKAR AND OTHERS reported in [2005] 2 SCC 188. In paragraph 20, the Apex Court held as under:

> "20. The first reason is that the High Court ought to have drawn an adverse inference against Respondent 1 for not filing the applications under Order 7 Rule 11 of the Code of Civil Procedure immediately after receiving those copies from the Registry of the High Court, as according to us, Respondent 1 ought not to have waited for more than a month to file the applications under Order 7 Rule 11 of the Code of Civil Procedure for rejection of election petitions when true copies were already served on Respondent 1. That apart, a perusal of the copies alleged to

have been served on Respondent 1 indicates that copies of the Election Petition which the petitioners did not submit for service were produced by Respondent 1 as having been served on Respondent 1."

39. Mr. Vakharia, learned advocate also relied on paragraphs 30, 31, 33, 35 and 36, the relevant portion of which reads as under:

"30. The High Court held that the election petitions were liable to be rejected on a finding that the abovenoted defects were vital in nature and therefore there was total non-compliance with Section 81 (3) of the Act. In our view, even the defects alleged as aforesaid in the Election Petitions could not be held to be vital in nature and thereby did not entail the High Court to dismiss the Election Petitions at the preliminary stage for non-compliance with Section 81 (3) of the Act. Let us now examine whether the Election Petitions were liable to be rejected for the defects shown above.

31. As noted herein earlier, Section 81 (3) postulates that every copy of the Election Petition shall be attested by the Election Petitioner under his own signature to be a

true copy of the petition. From a bare perusal of the defects which have been referred to herein earlier, we can safely conclude that such defects cannot be said to be of vital nature. According to Respondent 1, (1). there was no signature of the Election Petitioners at p. 10 of the petitions after the prayer clause and verifications, (2). the stamp in respect of the swearing of the affidavit was also absent on the copy of the Election Petitions, and (3). the affidavit accompanying the petition also does not bear the signature of the Election Petitioners.

33. xxx xxx xxx So far as the second defect namely the stamp in respect of the swearing of the affidavit was absent on the copy of the petition is concerned, we are of the view that mere omission to stamp in respect of the swearing of the affidavit would not at all be material when each and every copy of the petition was attested by the Election Petitioners. Reliance in this connection may be placed on the decision of this Court in the case of Ram Prasad Sarma v. Mani Kumar Subha. Similar is the position in respect of defect (3). From the record it appears that on each and every

page a handwritten attestation in ink under the signature of the Election Petitioner was made by the Election Petitioners. Therefore, mere omission to sign by the Election Petitioners in the affidavit accompanying the petition would not also be material. From the above, we can only conclude that such defects in the copies of the Election Petitions cannot lead us to reject the election petitions.

35. xxx xxx xxx We have carefully examined the defects as noted herein earlier and on a careful examination of the defects we cannot be persuaded to the view that the defects in the present case also are material or it was vital in nature or the absence of stamp of attestation could be treated to be a ground for rejection of the Election Petitions under section 81 (3) of the Act. It may be mentioned herein that the decision of this Court in Anil R. Deshmukh case was approved by the Constitution Bench and in which it already distinguished the case of Dr. Shipra. It must not be forgotten that the Constitution Bench decision of this court, it was evident that:

(a). the expression 'copy' in section 81 (3) of the Act means a

> copy which is substantially the same as the original, variation if any from the original should not be vital in nature or should not be such that can possibly mislead a reasonable person in meeting the allegations; (b). if the copy differs in material particulars from the original the same cannot be cured after the period of limitation".

The same principle was enunciated following a Constitution Bench's decision of this Court in T. Phungzathang v. Hangkhanlian. In this decision also it was held that the defects indicated in these cases for which dismissal of the Election Petition was sought for did not attract Section 86 (1) of the Act for dismissal of the Election Petitions for non-compliance with Section 81 (3) of the Act. For the reasons aforesaid and applying the principles laid down in the aforesaid decisions of this Court, we are of the view that the High Court ought not to have rejected the Election Petitions for non-compliance with the provisions of Section 81 (3) of the Act as the defects shown by Respondent 1 cannot be said to be fatal and the copies which were alleged to have been served or

supplied to Respondent 1 were wholly and substantially the same as the original. That apart, it is an admitted position, as noted herein earlier, true copies of the Election Petitions were duly served or supplied to Respondent 1. The question that was raised by the learned counsel for Respondent 1 before us was whether subsequent supply of such true copies on Respondent 1 could be treated to be a sufficient compliance with Section 81 (3) of the Act. Apart from the conclusions made hereinbefore, we are also of the view that in view of the decision of this Court in Anil R. Deshmukh v. Onkar N. Wagh this question needs to be decided in favour of the appellant and against Respondent 1. In para 17 of the aforesaid decision this Court observed as follows: (SCC p. 212).

> "We have already referred to the fact that even before arguments were heard on the preliminary objection by the High Court in this case, the true copies of the affidavits had been served on the first respondent and his counsel. In the facts and circumstances of this case, we have no doubt that there was sufficient compliance with the provisions of Section 81

(3) read with Section 83 (1)(c) of the Act even if it could be said that the copies served in the first instance on the first respondent were not in conformity with the provisions of the Act"".

36. Such being the position, we hold that the High Court was not justified in rejecting the Election Petitions for non-compliance with Section 81 (3) of the Act."

40.Mr. Vakharia also drew my attention to paragraph 66 of the judgment, which reads thus:

"66. It is now well settled that the statutory requirements of Sections 81 and 83 would be met if substantial compliance thereof is made".

41.Mr. Vakharia also drew my attention to paragraphs 71, 72 and 73 of the judgment which read thus:

"71. Sub-section (3) of Section 81 or Section 83 (1) of the Act although may or may not be mandatory, but it is not in dispute that the defects pointed out therein, if any, would be curable. Only when despite opportunities granted such defects are not cured, as would appear from the discussions made

hereinafter, that the election may be dismissed. Furthermore, correctness or otherwise of a statement made in the Election Petition would not entail rejection thereof at the threshold or would attract the provisions of Section 86 of the Act.

72. Section 83 of the Act deals with contents of an Election Petition. Clause (a) of sub-section (1) of Section 83 provides that an Election Petition shall contain a concise statement of the material facts, whereas clause (b) thereof provides that in case of corrupt practice full particulars in relation thereto are to be set out. Clause (c) of sub-section (1) of section 83 provides that an Election Petition shall be signed by the petitioner and verified in the mater laid down in the Code of Civil Procedure, 1908 for the verification of the pleadings, i.e. Order 6 Rule 15 CPC. A defective affidavit would not entail in limine dismissal of the election petition [see Vijay Laxmi Sadho (Dr.) v. Jagdish, G. Mallikarjunappa v. Shamanur Shivashankarappa and Kamalnath v. Sudesh Verma.

> 73. In Regu Mahesh v. Rajendra Pratap Bhanj Dev, this Court laid down the law in the following terms (SCC p.53 para 12).
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> > 12. It is, therefore, a settled position in law that defect in verification or an affidavit is curable. But further question is what happens when the defect is not cured. There is a gulf of difference between a curable defect and a defect continuing in the verification affidavit without any effort being made to cure the defect.

42. Mr. Vakharia, relying on the various observations made by the Apex Court in the aforesaid judgment submitted that the statutory requirement of S. 83 would be met if substantial compliance is made made; that a defective affidavit would not entail in limine dismissal of the Election Petition, and only when despite opportunities granted such defects are not cured that the Election Petition may be dismissed. Mr. Vakharia also relied on paragraphs 18 and 20 and argued that not only that there is delay in filing this application, but also this application requires to be rejected on the ground that the same is filed

after framing of issues by a consensus order and when the matter was posted for recording of evidence.

43. Having heard the learned advocates at length, having perused the various judgments cited before me, and having gone through the Election Petition, its verification and accompanying affidavit, I am of the considered opinion that this is not a case in which the Election Petition is required to be rejected at the threshold without considering the same on merits. The Election Petition requires to state a concise statement of material facts and full particulars of the alleged corrupt practice which is required to be supported by an affidavit in which the Election Petitioner is obliged to disclose his source of information. The Election Petition is signed and verified by the election petitioner, and the petition is also accompanied by an affidavit as per the requirement of proviso (1) to sec. 83 of the Act. Having gone through the same, the relevant section 83, Rule 94.A and Form 25, I am of the view that the said requirements are substantially complied with in the Election Petition. It is also required to be noted that evidence can be led subsequently on a plea raised in the pleadings. Reading even the verification filed as well as the affidavit in

Form 25, it can be said that the petitioner has substantially complied with the said provision. Ultimately what is required to be seen is: whether the Election Petition which is filed lacks any material facts; or whether it is filed without any legs to stand; or whether the Election Petitioner has made out a primafacie case for taking the matter for trial; or whether the same is filed only in order to harass the returned candidate without any basis or foundation for filing the petition. As pointed out earlier, from the averments made in the Election Petition, it cannot be said that no cause of action is disclosed. It also cannot be said that the affidavits to which reference is made in the earlier part of this order, form integral part of the petition and since copy of the same is not given to the other side along with copy of the petition, the Election Petition is required to be rejected. It is already pointed out above that there is no reference to such affidavits in the Election Petition. The affidavits are filed by two persons who were appointed as Polling Officers by the Government. As there is no reference to such affidavits in the Election Petition, there is no question of giving copies of such documents to the other side. It is also not the case that though such affidavits were annexed with the Election Petition, copy thereof was

not annexed with the copy served on the applicants. It is also required to be noted that the entire evidence need not be pleaded in the petition. It cannot be said that the Election Petition is filed on vague allegations. It is also not obligatory that the names of witnesses are also required to be mentioned in the Election Petition. It is also required to be noted that the affidavits in question are filed at the stage of production of documentary evidence, and they are not referred to, in the Election Petition. Even in reply to the present application, the Election Petitioner has clearly stated that the affidavit of aforesaid two polling officers were not available at the time of filing of the Election Petition and the same came to the possession of the election petitioner at a later point of time. It is also required to be noted that the Election Petitioner has made averments in the Election Petition about knowledge about booth capturing based on the information from the election agents of the Election Petitioner. On merits also, reply has been filed by the returned candidate. It is not even the case of the respondent at this stage that he is not aware who were the election agents of the petitioner. In my view, therefore, the Election Petition is not required to be dismissed in limine on the

ground that no cause of action is disclosed in the election petition or that material particulars are not disclosed in the election petition or that there is any defect in the affidavit. Instead of throwing away the petition on this preliminary ground, it would be proper to decide the Election Petition on its own merits. It is clarified that at this stage, this Court is not concerned about the merits of the Election Petition, which will be decided in due course on its own merits. The issues involved in the Election Petition is required to be decided after considering the evidence which may be lead by both the sides. Suffice it to say that by this Application, only preliminary contentions raised by the respondent is dealt with, and this Court is of the opinion that this is not a case in which it can be said that no cause of action is disclosed by the petitioner in her petition or that material particulars are not disclosed in the petition. It is clarified that the observations made in this order are limited only to this interim application filed by the returned candidate praying for dismissal of the Election Petition on preliminary grounds. Ultimately, as stated hereinabove, the Election Petition is to be decided on its own merits.

44.Subject to what is stated above, the above

application is rejected. No order as to costs.

45. The Election Petition is ordered to be proceeded on merits.

mathew [P. B. MAJMUDAR, J.]